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IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1975
No. 75-804

RICHARD T. HILL,

Petitioner,

vs.

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL 25,
ET AL.,

Respondents.

On Writ of Certiorari
to the Court of Appeal of
the State of California,
Second Appellate District

MEMORANDUM IN OPPOSITION TO
MOTION TO VACATE AND REMAND

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On January 26, 1976, this Court granted a Writ of Certiorari to review the decision of the Court of Appeal of the State of California in Hill v. United Brotherhood of Carpenters and Joiners of America (1975) 49 Cal.App.3d 614, 122 Cal.Rptr. 722. Two days later, Petitioner

Richard T. Hill died.^{1/} On the basis that it is a question of California law whether Petitioner Hill's judgment survived his death and that that issue can be answered authoritatively only by the California courts, Respondents urge that this Court should vacate the judgment of the Court of Appeal and remand this matter to that court for its determination of the issue. It is submitted, however, that since the California legislature and the California courts have in fact spoken explicitly and authoritatively on the question, no such action by this Court is either necessary or appropriate.^{2/}

The subject of the survival of actions in California is covered by Section 573 of the California Probate Code. That Section provides in pertinent part as follows:

"Except as provided in this section, no cause of action shall be lost by

^{1/}

A personal representative has now been appointed and her motion to be substituted in the place and stead of Petitioner Hill is filed concurrently herewith.

^{2/}

Respondents make no attempt to show that California law is in any respect unclear on the issue. In fact they do not refer to California law at all.

reason of the death of any person but may be maintained by or against his executor or administrator. . . . When a person having a cause of action dies before judgment, the damages recoverable by his executor or administrator are limited to such loss or damage as the decedent sustained or incurred prior to his death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived, and shall not include damages for pain, suffering or disfigurement. . . ."

Section 573 and the cases interpreting it make abundantly clear that Petitioner's cause of action against Respondents and the award of damages based thereon were unaffected by the death of Petitioner.

As to the punitive damages portion of the award, Section 573 explicitly provides that such damages are recoverable in spite of the death of a plaintiff. California courts have in fact construed the section to mean precisely what it says in this regard. (Stencel Aero Engineering Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 983, 128 Cal. Rptr. 691; Dunwoody v. Trapnell (1975) 47 Cal. App. 3d 367, 369-370, 120 Cal. Rptr. 859.)

As to the compensatory damages awarded herein, the jury was explicitly

instructed that no such damages were to be awarded for any harm suffered after April 17, 1969 [C.T. 529], so that there is no question that the compensatory damages recovered were, in the words of the statute, "limited to such loss or damage as the decedent sustained or incurred prior to his death."

The only remaining question is whether Petitioner Hill died "before judgment" within the meaning of Section 573, with the consequence that the compensatory damages award abated to the extent that it may have "include[d] damages for pain, suffering or disfigurement."^{3/}

The one reported California appellate decision directly in point on this question leaves no doubt that Petitioner died after judgment for the purposes of Section 573.

^{3/} The single cause of action on which the case went to the jury was for intentional infliction of severe emotional distress. It may or may not be that "severe emotional distress" falls within the category of "pain and suffering," as that term is used in Section 573; Petitioner has discovered no authority on the question. The jury did receive an instruction, in addition to those on intentional infliction of emotional distress [C.T. 524-528], as to what constitutes "pain and suffering" [C.T. 523]. This suggests that the Trial Court regarded the two categories of injury as distinct. "Severe emotional distress" and "pain and suffering" to the side, the jury was also instructed that it could award damages for medical and related expenses resulting from Respondents' tortious misconduct [C.T. 522].

In Love v. Wolf (1967) 249 Cal.App.2d 822, 58 Cal.Rptr. 42, the plaintiff obtained a verdict and judgment against one of two defendants for damages for personal injuries. The award included damages for pain and suffering. Deeming the award insufficient, the plaintiff moved for and was granted a new trial against that defendant on the issue of damages only. The defendant involved appealed from the order granting the new trial and from the judgment set aside by that order. While the appeal was pending, the plaintiff died. Her personal representative, perceiving that Section 573 might preclude any recovery for pain and suffering upon retrial, consented to reversal of the order for new trial as to that defendant. The Court of Appeal accepted this waiver and affirmed the judgment against that defendant in its entirety, including such portions of the damages award as were for pain and suffering. The Court of Appeal discussed the effect of the personal representative's waiver of new trial in the following terms:

"The superior court judgment was set aside in its entirety when the court granted a new trial as to damages. 'Taking out that recovery, nothing effective as a judgment remains in existence.' [Citation omitted.] As there can be only a single judgment in an action [Citation omitted], if the order granting the limited new trial on damages is to stand, there will be no final judgment until the trial of that issue ends and the determination

of the appeal, if any, from the then judgment.

"If the order does not stand, the judgment set aside by the order for new trial would be restored and then become final unless reversed. We find nothing in the statute which would require a reversal of a judgment merely because the successful plaintiff died while that judgment was on appeal. Thus, in this case, we would not be concerned with section 573 were it not for the order granting new trial and plaintiff's waiver of her right to a new trial if on that trial section 573 applies." (Id. at p. 840; emphasis added.)

The clear import of Love v. Wolf is thus that the term "before judgment" in Section 573 means before judgment in the trial court, and that the mere fact that the defendant may take an appeal from that judgment can have no effect whatsoever upon any award of damages for pain and suffering, unless, of course, the defendant secures reversal of the judgment upon some other basis.

It might be added that not only is the issue of abatement vel non squarely settled in Petitioner's favor by California law, but the authority

relied upon by Respondents in support of their motion is wholly inapposite. In Bell v. Maryland, 378 U.S. 226 (1964), there occurred following this Court's grant of certiorari a supervening change in the applicable substantive law in the state in which the lawsuit arose, such that "this case [now] involves not only a question of state law but an open and arguable one." (Id. at p. 241.) In Pagel v. MacLean, 283 U.S. 266 (1931), a beneficiary under a policy of veteran's insurance died while the petition for certiorari was pending. This raised new issues under the applicable substantive law, issues which had not been reached by the lower courts and which superceded the issues this Court had granted certiorari to decide. Here, there has been no supervening change in applicable state law and, as has been demonstrated above, state law on the issue of abatement is clear beyond cavil. Moreover, the death of Petitioner Hill has not raised new issues of substantive law eclipsing those upon the basis of which this Court granted certiorari.

CONCLUSION

For the foregoing reasons, it is urged that Respondents' Motion to Vacate and Remand should be denied.

Respectfully submitted,

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